

Letter of Findings Number: 04-20110145
Sales Tax
For Tax Years 2004-07

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ISSUE

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC §6-2.5-8-9; IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation doing business in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales tax, use tax, and interest for the tax years 2004, 2005, 2006, and 2007. The Department issued proposed assessments for these amounts and Taxpayer protested a portion of the proposed sales tax assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of a portion of the proposed sales tax assessments for 2004 through 2007. The Department issued the proposed assessments after determining that Taxpayer had not collected and remitted the proper amount of sales tax which it should have collected and remitted as a retail merchant. Taxpayer protests that it was not required to collect and remit a portion of the tax to which the Department referred. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The Department refers to IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

The Department issued its proposed sales tax assessments on the grounds that Taxpayer, as a retail merchant, did not collect and remit the proper amount of sales tax.

Taxpayer's first point of protest is in regards to a "tax reconciliation" listed in the audit report which addressed several adjustments which the Department considered under-reported. One of these items was food and beverage tax payments. The Department calculated overpayments and underpayments for the various categories and reached a final amount which it determined was due. Taxpayer protests that it was not credited with \$27,784 of food and beverage taxes which it did remit between 2005 and 2007. A supplemental audit will review and confirm the amount of food and beverage tax remitted during this period.

Taxpayer's second point of protest is in regards to a sales tax accrual reversal, or "truing up" as Taxpayer describes it, in the amount of \$89,882.64. Taxpayer states that it paid this amount and has not been given appropriate credit for these years. A review of the Department's records shows that a payment in that amount was made and applied to several of Taxpayer's sales tax liabilities, but not to the one for which it was intended by Taxpayer. A supplemental audit will review this matter and will ensure that the \$89,882.64 is applied to the proper account for the proper period.

Taxpayer's third point of protest is in regards to one of its customers, which Taxpayer states provided a direct pay permit. IC §6-2.5-8-9 provides:

- (a) A retail merchant, manufacturer, or wholesaler who is registered under this chapter may apply for a direct payment permit. The department may issue the permit subject to such conditions as it deems reasonable. A permit issued under this subsection does not expire and is valid unless revoked under subsection (c).
- (b) A person who possesses a direct payment permit may, at the time of a retail transaction, issue a direct payment certificate to a retail merchant instead of paying the state gross retail or use tax to that merchant. If the person issues a direct payment certificate, the person must then pay the tax on that purchase directly to the department. A retail merchant who receives a direct payment certificate has no duty to collect or remit the state gross retail or use tax on that transaction.
- (c) The department may revoke a direct payment certificate, without cause, at any time.

As part of the protest process, Taxpayer was able to provide a copy of the direct pay permit which its customer provided to Taxpayer. This direct pay permit was unavailable during the audit process. As provided by

IC § 6-8.1-8-9(b), Taxpayer, as a retail merchant, has no obligation to collect or remit sales or use tax since it received a direct pay permit from its customer.

In conclusion, Taxpayer's protest is sustained pending supplemental audit verification on the three points it presented. First, the food and beverage tax remitted will be reviewed and adjusted to reflect the amount remitted by Taxpayer during the audit period. Second, the \$89,882.64 will be credited to the proper account for the audit period. Third, Taxpayer is not responsible for collecting and remitting sales or use tax when it is presented with a direct pay permit. The amounts included as subject to the collection and remittance of sales tax for this customer will be removed from the Department's calculations of sales subject to the collection and remittance of sales tax. The Department will conduct a supplemental audit to reflect these three points and will recalculate sales tax due. Interest due will be recalculated to reflect the recalculation of base tax.

FINDING

Taxpayer's protest is sustained.

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